



# Legal Views

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*A Resource From Montgomery County's Office of the County Attorney*

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## When is an Employee Not an Employee?

**Karen L. Federman Henry**

Many situations require interpretation of a local law in light of the enabling charter of the entity. Recently, the Court of Special Appeals considered the effect of an amendment to the Ocean City Charter to permit “employees” of the police department to engage in collective bargaining. The amendment directed the City Council to enact a labor code to address the details. When the City Council did so, it drafted the code in a way that precluded officers of the rank of lieutenant and higher from engaging in collective bargaining.

The matter entered the Circuit Court for Worcester County when six members of the Ocean City Police Department holding the rank of lieutenant or captain filed suit seeking mandamus or declaratory judgment. They argued that the labor code limitation violated the charter

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## How ‘Bout That Doggy in the Window?

**Christine Collins**

On February 15, 2005, Oscar Cruz rented a Chevy Trailblazer at Logan International Airport, loaded his sole piece of “luggage” into the rear tailgate, and was subsequently pulled over by a Maryland State Trooper southbound on Interstate 95 for tailgating. It turns out that the “luggage” Mr. Cruz loaded was a taped-up box labeled “Dremel,” containing 11.9 pounds of cocaine.

During the initial conversation with Mr. Cruz, the Trooper observed extremely nervous behavior such as trembling hands, evasive eye contact, chest palpitations, and a visibly pounding carotid artery in Mr. Cruz’s neck. The Trooper ran Mr. Cruz’s Massachusetts driver’s license through his computer and reviewed the rental car agreement, indicating that the vehicle would be returned to Logan International Airport the following morning. Peering through the windows of the vehicle, the Trooper observed that Mr. Cruz’s sole piece of luggage was a taped-up power tool box. Based on the Trooper’s reasonable suspicion that Mr. Cruz might be transporting an illegal substance, he called for a K-9 Unit.

When Bruno, a yellow Labrador Retriever certified in controlled dangerous substance detection, arrived on the scene, the Trooper walked Bruno toward Mr. Cruz’s vehicle. Bruno first alerted to the presence of narcotics when he reached the rear corner of the tailgate. Bruno then walked to the side of the vehicle where the rear window was down, spontaneously jumped up on the window sill, stuck his nose into the vehicle, and again alerted to the presence of narcotics. This led to the warrantless search of Mr. Cruz’s vehicle and ultimate discovery of cocaine.

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amendment by prohibiting their participation in collective bargaining. The circuit court agreed with them, and the City appealed.

The Court of Special Appeals began with statutory construction principles and noted the ambiguity in the charter—it referred to “employees,” but not to “all employees.” When read in conjunction with the instruction to provide a labor code, the Court viewed the provision as granting the City the ability to decide what the appropriate bargaining unit would be, i.e., which employees were eligible. Further analysis revealed that the officers who served as lieutenants and higher exercised supervisory duties that were inconsistent with the concept of collective bargaining, because it effectively “pitted” those entrusted with leading the department against the department itself.

In support of its conclusion, the Court mentioned the system in Montgomery County. While the Montgomery County Charter authorizes the Council to provide for collective bargaining, the County Code defines which employees may participate. For police officers, the Montgomery County Code identifies eligible officers of a variety of ranks, but excludes officers in a higher classification than sergeant. *See* Montg. Co. Code § 33-76. This approach gives the Charter the effect of a constitution—the charter provides the basic function and the legislative body enacts laws to allocate the power among the executive agencies. ❖

*Mayor and City Council of Ocean City v. Bunting*, 2006 Md. App. LEXIS 41 (Filed April 4, 2006).



Mr. Cruz agreed that a sniff to the exterior of his vehicle was lawful, but sought suppression of the evidence based on the fact that Bruno put his nose through the window, as opposed to remaining outside the vehicle. There appeared to be some dispute as to whether Bruno first alerted at the rear of the tailgate, as opposed to after he stuck his nose through the open window. In reviewing the holding of the trial court, the Court of Appeals proceeded on the assumption that Bruno first alerted when he jumped on the window sill and stuck his nose through the open window.

The Court held that Bruno’s actions did not constitute an unreasonable search of the interior of the vehicle, since there was no evidence that the Trooper encouraged Bruno to jump on the vehicle or stick his nose through the open window, i.e., that Bruno’s actions were instinctive, rather than induced. ❖

*Oscar E. Cruz v. State of Maryland*, 2006 Md. App. LEXIS 40 (Filed April 4, 2006).

## Proper Ethics – Maintaining Confidentiality

### Chris Hinrichs

Most individuals know and understand that attorneys are required to keep the attorney-client relationship confidential in nature. But, did you know Montgomery County employees may be required to keep their “working knowledge” confidential as well? In fact, the Montgomery County Code, Section 19-A-15 (a), prohibits public employees, including former public employees, from revealing any confidential information that is not available to the public.

The reason for the prohibition on the disclosure of confidential information may be best understood by considering the rules that apply to attorneys. Attorneys in Maryland are bound by The Lawyer’s Rules of Professional Conduct. In particular, Rule 1.6 prohibits attorneys from “reveal[ing] information relating to [the] representation of a client.” The reason for this provision is generally understood to exist for the

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# Notice of a Tax Sale – Once, Twice, Three Times!

**Scott Foncannon**

In June of each year, the warm weather accompanies the season of tax sales in Maryland. Before the County sells the tax liens, a notice of delinquency and a separate notice of tax sale have been sent to the property owner at the address listed on the tax roll. In addition, notice of the coming sale is published in the local newspaper. After the sale, the purchaser of the tax lien must foreclose the equity of redemption in a separate suit filed in Circuit Court. To perfect the suit, the purchaser must effect personal service of the complaint on the property owner. The series of notices and the subsequent judicial process gives a property owner ample opportunity to redeem and protect the property.

The United States Supreme Court recently addressed the issue of just how much notice is due before real property can be sold at a tax sale. In a case involving Arkansas law, the property owner challenged the tax sale because he did not receive notice of the tax delinquency and pending sale. The notice of the delinquency and pending tax sale was sent to the property address by

certified mail, but the letter was returned unclaimed. The property owner had moved after separating from his wife and had failed to notify the tax office. Further complicating the situation, the estranged wife refused to accept the certified mail addressed to the husband, and the mortgage was paid off, so the mortgage company was no longer paying the taxes. After two years of delinquency, the Commissioner published notice of public sale and sold the property at tax sale.

The Supreme Court concluded that the State must use a means of notifying the property owner that is reasonably calculated to apprise interested persons of the action so that they may object. To evaluate the adequacy of notice, the Court recommended balancing the State's interest against the individual's Fourteenth Amendment interest. The government must consider the unique information about an intended recipient, regardless of the statutory scheme. In the Arkansas case, the State should have known that the notice was ineffective when the certified mail returned undelivered. Additional, reasonable steps were available, practicable, and required to provide notice to the homeowner. Although specific reasonable or practicable steps will be determined on a case-by-case basis, sending the letter by regular mail (not certified) or posting the notice on the property may have sufficed in this case. The Court mentioned searching the phonebook or other public records, but did not require those extra measures.

The case presents a slight dilemma for some jurisdictions. Despite the options available in this case, it remains unclear what additional steps will be considered to be reasonable and practicable. Moreover, the Court specifically referred to Maryland case and statutory law and suggested that counties in Maryland must do more than mail the notice of delinquency and tax sale to the taxpayer's address, but how much more remains unclear. Conceivably, the Maryland process satisfies constitutional principles by requiring multiple notices before and after the sale, including personal service of process of a suit to foreclose the right of redemption. ❖

*Jones v. Flowers*, 126 S.Ct. 1708 (2006).

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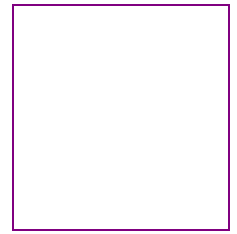
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ADDRESS CORRECTION REQUESTED

### ***Proper Ethics***

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purpose of allowing open and free communication from the client to the attorney so the attorney can best serve his/her client.

Many public employees are often involved in situations in their job whereby they receive information - not held by the general public - for the purpose of carrying out their duties. This information may be confidential for a variety of reasons, including: litigation, matters involving law enforcement, matters involving juveniles, confidential sources ("tips"), contract negotiations, and a variety of other sensitive issues that may involve unjustified injury to persons or the County if revealed. The receipt of confidential information by public employees serves the government much in the same way confidential information serves attorneys. The public is the beneficiary of the internal free flow of confidential information by enhancing the productivity and efficiency of government operations. The goal of the free flow of confidential information within government is to allow public employees to have a wide

array of information and sources to draw from in the course of making determinations that best serve the public.

Public employees who disclose confidential information may be investigated by the Ethics Commission and may be charged with a class A violation of the County Code. In addition, a public employee who makes a financial gain from the disclosure of confidential information may have a civil action filed against him/her by the County to recover the gain he/she received as a result of the unlawful disclosure.

A public employee who wishes to avoid the penalties associated with an unlawful disclosure of confidential information should remember the old saying, "less is more." For additional guidance, refer to Chapter 19A of the Montgomery County Code or contact the Office of the County Attorney. ❖